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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. KENNETH EUGENE THURLOW, Defendant-Appellant.	)	NO. 33969 APPELLANT'S BRIEF

FILED - COPY
FEB - 6 2009
Supreme Court Court of Appeals
Entered on ATS by:

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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STATEMENT OF THE CASE

Nature of the Case

Kenneth Thurlow appeals from the district court's Second Amended Judgment and Sentence wherein he was sentenced to a fixed-life term upon a jury finding him guilty of first degree murder. Mr. Thurlow asserts that the district court abused its discretion by failing to appoint a second attorney to assist him in his defense. Further, Mr. Thurlow asserts that the district court abused its discretion by imposing an excessive sentence.

Statement of the Facts and Course of Proceedings

The State filed a criminal complaint alleging that Mr. Thurlow had committed the crime of murder in the first degree by shooting Christopher West in the head with a shotgun. (R., pp.25-26.) Mr. Thurlow, represented by Ken Stone, first requested that the district court appoint a second attorney to aid in his representation; however, the State affirmatively asserted, then filed a written notice, stating that it would not seek the death penalty and the district court denied the motion for second counsel. (R., pp.73-74, 84-85; Exhibit: Notice by State of Idaho Not To Seek Death Penalty.)

The State also alleged that Christopher Lewers committed first degree murder in the death of Mr. West by aiding and abetting Mr. Thurlow and the cases were consolidated for the purposes of the preliminary hearing. (R., pp.76-80; Tr., Prelim.) At the conclusion of the preliminary hearing, Mr. Thurlow was bound over into the district court and an Information was filed charging him with the above crime. (R., pp.75-83.)

After the preliminary hearing, a Notice of Substitution of Counsel was filed indicating that Linda Payne was now representing Mr. Thurlow. (R., pp.97-98.)

The State filed a motion to consolidate Mr. Thurlow's case with Mr. Lewers' case for convenience purposes. (R., pp.102-104; Tr., p.29, L.4 – p.30, L.11.)[1] Both Mr. Thurlow and Mr. Lewers' opposed the motion (R., pp.113-114; Tr., p.30, L.14 – p.35, L.19.) with counsel for Mr. Lewers' noting that the defendants are "going to be alleging different, perhaps defense, certainly different allegations are going to be made. I'm assuming pointing of fingers, perhaps, of one or the other ...". (Tr., p.34, Ls.22-25.) The district court granted the State's motion to consolidate, but left open the option of defense counsel filing a motion for relief from prejudicial joinder. (Tr., p.35, L.22 – p.37, L.21.)

Ms. Payne asked the court again to appoint a second attorney to assist in Mr. Thurlow's defense. (Tr., p.40, Ls.11-12.) Ms. Payne asserted that she needed a second chair because she was a sole practitioner with the final conflict contract for Bonner County and she has to take other cases in order to make a living. (Tr., p.42, Ls.10-17.) She asserted that the magnitude of the case required a large amount of legal research and that she needed to work with an investigator, Mr. Thurlow, and a mitigation expert in the event that Mr. Thurlow was convicted. (Tr., p.42, Ls.18-22.) She asserted that she did not believe that she could represent Mr. Thurlow by herself without being ineffective. (Tr., p.42, Ls.22-24.) Counsel for Mr. Thurlow noted that Mr. Lewers and the State were represented by multiple attorneys and that she wanted

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[1] Unless otherwise indicated, all references to transcripts will describe the bound transcript containing the arraignment hearing held on 11/1/05, the pre-trial hearings held [illegible] and the sentencing hearing.

to level the playing field. (Tr., p.42, L.24 – p.43, L.9.) Counsel for Mr. Lewers also asked for a second attorney to assist in Mr. Lewers' defense arguing that she was, *de facto*, a sole practitioner. (Tr., p.43, L.22 – p.44, L.23.)

The State opposed the motions for second chair arguing that Bonner County should not have to pay for a second chair as both attorneys had entered into contracts with the county to provide legal services. (Tr., p.44, L.25 – p.47, L.12.) The State argued that there was nothing unique about the case other than the large number of exhibits, the large amount of discovery, and the seriousness of the offense. (Tr., p.45, Ls.12-14.) In response, counsel for Mr. Thurlow stated that her entire contract is worth $27,500.00 per year, that she needs to take on other work in order to keep afloat and to pay her expenses including her staff, and that "I'm asking for my client, Your Honor, I'm not asking for me." (Tr., p.47, L.15 – p.49, L.6.)

The district court ultimately denied Mr. Thurlow's motion for a second attorney finding, among other things, that both prosecutors and public defenders are typically overworked, that other types of cases were just as serious as this first degree murder case, and that, "Even if [automatically appointing a second counsel in a first degree murder case] is an appropriate and wise thing to do, it would appear to the court it's probably more a responsibility of the county, Bonner County, than it is of this court to simply interfere with the contractual or the legal obligations that the county has." (R., pp.120-121; Tr., p.50, L.22 – p.52, L.23.) The district curt stated its view that it was the county's responsibility to provide adequate counsel and it may be wise for them to do so "if the conflict arrangement is spread so thin ...". (Tr., p.53, Ls.1-21.) The court went on to find that it would be setting a "dangerous precedent" by appointing a second

attorney to the defendant merely because the State had two attorneys because "[b]efore long we'll be weighing how many cases the state attorney has handled, how many years of practice, and then try to bring these all up on any equal basis. While that's a nice ideal concept, I don't think that's what the law merits." (Tr., p.52, L.24 – p.54, L.6.)

Mr. Thurlow filed a motion requesting that the district court sever his case from Mr. Lewers' case or, in the alternative, that the district court seat separate juries for the two defendants. (R., pp.145-151.) Before ruling on this motion, the district court took up a motion to suppress statements made by Mr. Lewers and filed by his counsel. (Tr., p.93, L.15 – p.122, L.2.) The district court ultimately denied Mr. Lewers' motion to suppress, but granted the motion to sever the cases for trial. (R., pp.182-195.) Mr. Thurlow's case then proceeded to trial.

Police officials began investigating the death of Christopher West, whose body was found at a tow yard called Evergreen Towing, on the morning of August 21, 2005. (Tr., p.332, L.3 – p.348, L.8.) Mr. West died from a shotgun wound to his head coming from a .410, "snake charmer" shotgun. (Tr., p.639, L.4 – p.648, L.5; p.743, L.24 – p.818, L.17.) Kurt Lewers, Chris Lewers' father, owned a .410 shotgun which was stolen from his house while he was working out of state. (Tr., p.712, L.22 – p.729, L.10.) Andrea Cordle, Kurt Lewers' daughter and Chris Lewers' sister, had a key to the residence and took care of the animals while Kurt Lewers was out of state and Chris Lewers took care of the yard. (Tr., p.698, L.13 – p.729, L.10.) The thief first broke into the house by reaching through a doggie door unlocking the front door, then kicked in Mr. Lewers' bedroom door, and then stole only a jar of change and the .410 shotgun. (Tr., p.698, L.13 – p.729, L.10; p.717, Ls.11-15.)

The State presented the testimony of Tina Mongan who testified that Ken Thurlow and Chris Lewers came to her place on the night of August 20, 2005, and the three consumed methamphetamine. (Tr., p.662, L.2 – p.670, L.1) Mr. Lewers attempted to sell Ms. Mongan a .410 shotgun, which she declined. (Tr., p.676, L.18 – p.677, L.24.) Ms. Mongan asked Mr. Thurlow to pick her up some gasoline and muratic acid, the two left, and returned a couple of hours later. (Tr., p.678, L.7 – p.679, L.9.) When they returned, Mr. Lewers had a cut over his eye and was not wearing the same clothes, while Mr. Thurlow was wearing the same overalls that he was wearing earlier. (Tr., p.671, L.18 – p.672, L.11.) Mr. Thurlow explained that Mr. Lewers' cut resulted from him getting hit. (Tr., p.673, Ls.17-21.)

Donny Dixon testified that he is in essence a caretaker at Evergreen Towing and that he lives on the property. (Tr., p.573, L.8 – p.575, L.1.) Mr. Dixon testified that Christopher West was at Evergreen Towing twice on the day he died. (Tr., p.575, L.13 – p.578, L.23.) Mr. Dixon testified that on that same night Mr. Thurlow walked up to him and asked him for some muratic acid. (Tr., p.578, L.24 – p.579, L.11.) Mr. Dixon then went to his trailer to get the muratic acid – he thought Mr. Thurlow had gone at least part of the way with him. (Tr., p.581, L.12 – p.583, L.5.) After Mr. Dixon looked through his trailer, but could not find the muratic acid, Mr. Thurlow walked up to the door and told him that Mr. West was dead. (Tr., p.583, Ls.7-22.) Mr. Dixon did not believe him, they walked over to where Mr. West lay and Mr. Dixon saw his body. (Tr., p.583, L.23 – p.584, L.19.) When he walked over to the body, Mr. Dixon noticed that there was another person there who had a long coat on, as did Mr. Thurlow, and it looked to Mr. Dixon that the other person was holding a weapon. (Tr., p.585, Ls.14-24.)

Mr. Thurlow suggested that they load Mr. West's body into the truck that Mr. West was working on, but Mr. Dixon stated that it would not run. (Tr., p.584, L.21 – p.585, L.13.) Mr. Dixon then testified as follows:

> Q. Then what happens?
>
> A. Well, this guy, he had something under his coat. And there was a big tree here. I sort of, no, man, I want nothing to do with this as I walked around this way, because he looked like he was wanting to get me in the line of fire, you know, without shooting Kenny. So I walked around this way, the tree and everything, and Kenny was right about there.
>
> Q. So Kenny Thurlow moved back here near where you were then?
>
> A. Yeah, I walked around this tree.
>
> Q. Right, you went around the tree but Thurlow came back and met up with you?
>
> A. Yeah.

(Tr., p.587, Ls.9-21.) Mr. Dixon then agreed that he would leave on his bike, Mr. Thurlow and Mr. Lewers would leave, Mr. Dixon would return in the morning and call the police. (Tr., p.589, L.1 – p.596, L.12.)

When serving a search warrant, the police found in Mr. Thurlow's bedroom, among other items, the .410 shotgun and a large shirt with blood on it that was eventually proven to have come from Mr. West. (Tr., p.398, L.12 – p.400, L.4; p.421, L.21 – p.422, L.18; p.1022, L.14 – p.1024, L.3.) Michael Thurlow, Kenny Thurlow's son testified that Chris Lewers was their neighbor and that he had access to Kenny Thurlow's locked bedroom and that he had found him "all the time" in the bedroom without Kenny Thurlow, including a couple of days before they were arrested. (Tr., p.1080, L.10 – p.1085, L.19.)

Kenny Thurlow testified on his own behalf. (Tr., p.1164, L.8.) Mr. Thurlow denied shooting Mr. West, but stated that he saw Chris Lewers standing over Mr. West's body holding a shotgun. (Tr., p.1164, L.25 – p.1165, L.7.) Mr. Thurlow testified that he had seen Mr. West at Evergreen towing earlier in the day. (Tr., p.1165, L.15 – p.1166, L.23.) He went back to his apartment, met up with Mr. Lewers, and the two went to Ron Anderson's, a neighbor of Tina Mongan, so that Mr. Lewers could collect on a drug debt from Mr. Anderson. (Tr., p.1167, L.4 – p.1169, L.13.) While Mr. Lewers met with Mr. Anderson, Mr. Thurlow visited with Ms. Mongan. (Tr., p.1169, L.25 – p.1170, L.22.) Mr. Lewers returned about 20 minutes later. (Tr., p.1171, Ls.2-4.)

Mr. Thurlow testified that upon his return, Mr. Lewers attempted to sell Ms. Mongan the .410 shotgun, a weapon that Mr. Lewers had shown Mr. Thurlow a few days earlier when he tried to sell it to him. (Tr., p.1171, Ls.8-20.) That was the first time Mr. Thurlow had seen the .410 that night. (Tr., p.1171, Ls.21-23.) Upon Ms. Mongan's requests, Mr. Thurlow and Mr. Lewers went to buy her some gasoline and to get some muratic acid from Donny Dixon. (Tr., p.1172, L.10 – p.1173, L.11.)

When they arrived at Evergreen towing, Mr. Thurlow tied an unloaded 12 gauge shotgun with a shoestring, wrapped the shoestring around his shoulder, put it under his clothing, and took it to see if Mr. Dixon wanted it because he had complained of people coming onto the property and raising havoc. (Tr., p.1175, L.4 – p.1179, L.13.) Mr. Thurlow began looking for Mr. Dixon and Mr. Lewers followed him. (Tr., p.1179, L.18 – p.1180, L.10.) Mr. Thurlow went up to Mr. Dixon's door, Mr. Dixon was not there, then Mr. Thurlow walked to the shop and he noticed that Mr. West was at Evergreen Towing. (Tr., p.1181, L.11 – p.1182, L.8.) Mr. Thurlow went and found Mr. Dixon in the

shop, he asked him if he had any muratic acid to which Mr. Dixon indicated that he did, and they began walking back towards Mr. Dixon's trailer. (Tr., p.1182, Ls.12-24.)

Mr. Thurlow then noticed that Mr. West and Mr. Lewers were fighting. (Tr., p.1182, L.24 – p.1183, L.20.) Mr. Thurlow admitted that tried to break up the fight, first verbally, and then by hitting Mr. West on the head with the butt of his shotgun – Mr. Lewers was also struck above the eye. (Tr., p.1183, L.21 – p.1185, L.5.) Mr. West took off running and Mr. Lewers chased him. (Tr., p.1185, Ls.17-23.) Mr. Thurlow then heard Mr. West yell "Donny," and heard a boom. (Tr., p.1188, Ls.9-12.) He saw Mr. Lewers standing over Mr. West and heard him say that Mr. West should not have yelled. (Tr., p.1188, Ls.12-16.)

Mr. Lewers then told Mr. Thurlow that, "where I come from the other guy is on you" meaning that he wanted Mr. Thurlow to kill Mr. Dixon which Mr. Thurlow refused to do. (Tr., p.1189, Ls.11-16.) Mr. Thurlow went to Mr. Dixon and told him that Mr. West was dead and asked him what he wanted them to do. (Tr., p.1189, L.16 – p.1190, L.12.) After Mr. Dixon saw Mr. West's body, they discussed putting Mr. West's body in his truck, but Mr. Dixon said the truck was not running. (Tr., p.1190, Ls.13-24.) Mr. Thurlow asked Mr. Dixon to be the lookout in order to get him away from there because he didn't want Mr. Lewers to shoot Mr. Dixon. (Tr., p.1191, L.19 – p.1192, L.10.)

Mr. Thurlow and Mr. Lewers returned to Ms. Mongan's residence where Mr. Lewers sold items stolen from Mr. West's truck to a friend of Ms. Mongan's, Kevin Bettis. (Tr., p.687, L.8 – p.693, L.15; p.1194, L.22 – p.1195, L.5; p.1200, L.11 – p.1201, L.3.) Although he owned the shirt, Mr. Thurlow testified that Mr. Lewers was wearing

the shirt that was ultimately found to have Mr. West's blood on it. (Tr., p.1192, L.23 – p.1193, L.13.) A couple of days later, Mr. Lewers brought the .410 over to Mr. Thurlow's apartment and asked him to get rid of it, which Mr. Thurlow refused to do, but he did not give the shotgun back to Mr. Lewers because "[i]f it was in my home, I knew that he didn't have it." (Tr., p.1208, L.7 – p.1209, L.13.) Mr. Thurlow testified that he did not know that Mr. West was going to be at Evergreen Towing and that he, himself, did not plan on going over there until Ms. Mongan asked him to get some muratic acid. (Tr., p.1219, L.12 – p.1220, L.1.)

At the conclusion of its case in chief, the State amended the Information to charge Mr. Thurlow in the alternative with first degree murder by aiding and abetting in the crime. (R., pp.276-277; Tr., p.1048, L.12 – p.1049, L.21.) The jury found Mr. Thurlow guilty of first degree murder although they did not designate whether they found that he personally killed Mr. West or whether he aided and abetted Mr. Lewers in the commission of the crime. (R., pp.314-315; *see also* Jury Instructions, *generally*.) At the conclusion of a sentencing hearing, the district court sentenced Mr. Thurlow to a fixed-life term. (R., pp.356-358; Tr., p.1404, L.1 – p.1442, L.8.) Mr. Thurlow filed a timely Notice of Appeal from the district court's Second Amended Judgment and Sentence. (R., pp.362-372.)[2]

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[2] This Court entered an Order To Clarify Jurisdiction and Reset the Briefing Schedule In which this Court ruled that it shall "MAINTAIN JURISDICTION IN THIS APPEAL and

ISSUES

1. Did the district court abuse its discretion in denying Mr. Thurlow's request for a second attorney by failing to reach its decision by determining the need for the second attorney?

2. Did the district court abuse its discretion by executing a fixed-life sentence upon Mr. Thurlow in light of his likely culpability in the crime, his actions to prevent the murder of Mr. Dixon, and other mitigating factors?

ARGUMENT

I.

The District Court Abused Its Discretion In Denying Mr. Thurlow's Request For A Second Attorney By Failing To Reach Its Decision By Determining The Need For The Second Attorney

A. Introduction

When determining whether to grant Mr. Thurlow's motion for a second attorney, filed by his counsel Linda Payne, the district court focused on the nature of the contract between Ms. Payne and Bonner County, accepted as an unsolvable problem that public defenders are over-worked, and stated that it was determined to avoid setting a "dangerous precedent." Because the district court's focus should have centered upon the need for the second attorney under the Federal and Idaho Constitutions, Mr. Thurlow asserts that the district court abused its discretion by denying his motion.

B. In Order To Ensure That A Defendant's Right To Counsel Is Honored, The Appointment Of Second Counsel May Be Necessary

The Sixth and Fourteenth Amendments to the United States Constitution, and Art. I, § 13 of the Idaho Constitution guarantee that indigent defendants have the right to counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Pharris v. State*, 91 Idaho 456, 424 P.2d 390 (1967). Idaho Code § 19-852(a)(1) requires:

> [a] needy person . . . who is under formal change of having committed, or is being detained under a conviction of, a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel is so entitled.

I.C. § 19-852(a)(1). Furthermore, Idaho Criminal Rule 44.3 requires the court to provide a defendant in a capital case with two qualified attorneys. I.C.R. 44.3. Although there is no statute or criminal rule that specifically addresses when a defendant should be

granted a second attorney in a non-capital case, the Idaho Supreme Court has recognized that appointing a second attorney may be necessary under certain circumstances – although the Court has not articulated what those circumstances may entail.

"It is well established that when a defendant has been provided with an attorney at public expense, his request for additional counsel is committed to the district court's sound discretion." *State v. Hairston*, 133 Idaho 496, 515, 988 P.2d 1170, 1189 (1999) (citing *State v. Pizzuto*, 119 Idaho 742, 775, 810 P.2d 680, 713 (1991)). When an exercise of discretion is reviewed on appeal, the appellate court conducts a multi-tiered inquiry. The sequence of the inquiry is (1) whether the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the outer boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989) (citing *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987)).

Mr. Thurlow asserts that the "legal standards applicable" to the question of whether a second attorney must be appointed must relate directly to the bases for appointing counsel to indigent defendants in the first instance. In *Johnson v. Zerbst*, 304 U.S. 458 (1938), the United States Supreme Court recognized that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id* at 463. The Court recognized that putting a defendant on trial without the assistance of counsel may lead to a conviction based upon "incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Id.* In

Gideon v. Wainwright, 372 U.S. 335 (1963), the Supreme Court interpreted the Sixth Amendment right to counsel in light of the due process clause of the Fourteenth Amendment. *Id.* The Court reviewed its own precedents along with "reason and reflection" and recognized that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." *Id.* at 344.

Of course, Mr. Thurlow was in fact appointed an attorney to represent him; however, simply having an attorney is not enough. The right to counsel includes the right to effective assistance of counsel.[3] *See Strickland v. Washington*, 466 U.S. 668 (1984). An attorney that lacks the time and the resources to meaningfully represent a defendant is no less ineffective than an attorney who, though having adequate time and resources, fails to conduct an adequate defense. In either situation, the defendant is deprived his Sixth Amendment right to counsel. Mr. Thurlow asserts that the "legal standards applicable" to the question of whether a second attorney should be appointed to assist in the defense, is whether the initially appointed attorney has the time, resources, and capabilities to provide the constitutionally required assistance of counsel, without the assistance of a second attorney.

C. The District Court Abused Its Discretion By Acting Inconsistently With The Legal Standards Applicable In Denying Mr. Thurlow's Request For A Second Attorney

The district court ruled on Mr. Thurlow's request for counsel based upon irrelevant considerations such as the costs to Bonner County and its contract with Ms. Payne, and the court's acceptance that overworked defense counsel is simply a

[3] Mr. Thurlow does not raise any ineffective assistance of counsel claims in this appeal.

fact of life that should not be remedied by supplying additional counsel. The district court found that both prosecutors and public defenders are typically overworked, that other types of cases were just as serious as this first degree murder case because a life sentence may be imposed, and that, "Even if [automatically appointing a second counsel in a first degree murder case] is an appropriate and wise thing to do, it would appear to the court it's probably more a responsibility of the county, Bonner County, than it is of this court to simply interfere with the contractual or the legal obligations that the county has." (R., pp.120-121; Tr., p.50, L.22 – p.52, L.23.) The court went on to find that it would be setting a "dangerous precedent" by appointing a second attorney to the defendant merely because the State has two attorneys because "[b]efore long we'll be weighing how many cases the state attorney has handled, how many years of practice, and then try to bring these all up on any equal basis. While that's a nice ideal concept, I don't think that's what the law merits." (Tr., p.52, L.24 – p.54, L.6.)

As argued above, the applicable legal standard should be whether or not appointing a second attorney is necessary to ensure that Mr. Thurlow's right to due process of law, specific to his right to counsel, will be met. The district court's consideration of the cost to Bonner County and its contract with Ms. Payne is simply irrelevant. Furthermore, the fact that Ms. Payne was admittedly over-burdened with the responsibility of providing Mr. Thurlow with adequate counsel due to her obligation to pay her bills, should have weighed in favor of appointing a second attorney – rather than being dismissed as a fact of life that the court should not attempt to remedy. The Sixth Amendment right to counsel as well as the right to a fair trial comprehended by the due process clause of the Fourteenth Amendment would be meaningless if they were

subservient to the fiscal concerns of the state that is required to, and the attorney who is appointed to, provide these services.

Counsel for Mr. Thurlow brought these concerns to the district court's attention in support of her request for a second attorney. The district court abused its discretion by determining the issue under a false legal standard – the cost to the county and its contract with Ms. Payne – rather that the applicable legal standards – whether Mr. Thurlow's right to counsel requires the appointment of a second attorney. As such, the district court abused its discretion in denying Mr. Thurlow's requests for a second attorney, his conviction must be vacated and his case remanded to the district court.

II.

The District Court Abused Its Discretion By Executing A Fixed-Life Sentence Upon Mr. Thurlow In Light Of His Likely Culpability In The Crime, His Actions To Prevent The Murder Of Mr. Dixon, And Other Mitigating Factors

A. Introduction

Non-capital, first degree murder is a serious offense requiring a significant punishment and, in some situations, a fixed-life sentence is warranted. However, Mr. Thurlow asserts that his actions were not so egregious that a fixed-life sentence, the harshest sentence a court can impose short of the death penalty, was warranted. The evidence presented at trial suggests strongly that Christopher Lewers, not Mr. Thurlow, shot and killed Mr. West. Furthermore, testimony from Donald Dixon suggests that Mr. Thurlow prevented Mr. Lewers from killing him, thus, showing that Mr. Thurlow does not so utterly lack rehabilitative potential that a fixed life sentence is necessary for retribution and public safety. In light of these and other mitigating factors, Mr. Thurlow

asserts that the district court abused its discretion and his fixed-life sentence is excessive.

B. The District Court Abused Its Discretion By Executing A Fixed-Life Sentence Upon Mr. Thurlow In Light Of His Likely Culpability In The Crime, His Actions To Prevent The Murder Of Mr. Dixon, And Other Mitigating Factors

A fixed-life sentence is the harshest penalty, beside the death sentence, that may be imposed for any crime. *State v. Helms,* 143 Idaho 79, 81, 137 P.3d 466, 468 (Ct. App. 2006). An individual, who is sentenced to fixed-life, is never given an opportunity for the consideration of mitigating factors that may evolve over time, such as good behavior, successful rehabilitative treatment, and mellowing with age. *Id.* Because of the gravity of this punishment, Idaho courts have stated that a fixed-life sentence may be reasonable "'if the offense is so egregious that it demands an exceptionally severe measure of retribution and deterrence, or if the offender so utterly lacks rehabilitative potential that imprisonment until death is the only feasible means of protecting society.'" *Id.* (quoting *State v. Eubank,* 114 Idaho 635, 638, 759 P.2d 926, 929 (Ct. App. 1988)); *see also State v. Jackson,* 130 Idaho 293, 294, 939 P.2d 1372, 1373 (1997).

Clearly, first degree murder is a serious offense, justifying a substantial prison sentence, but a fixed life sentence is a penalty that should not be imposed lightly. Although the court can never be certain that an individual will not re-offend, "a fixed [life] sentence should not be regarded as a judicial hedge against uncertainty." *Jackson,* 130 Idaho at 294, 939 P.2d at 1373 (citing *Eubank,* 114 Idaho at 638, 759 P.2d at 929). Therefore, a fixed life sentence "should be regarded as a sentence requiring a high degree of certainty . . . that the nature of the crime demands incarceration until the

perpetrator dies in prison, or certainty that the perpetrator never, at any time in his life, could be safely released." *Jackson,* 130 Idaho at 294-295, 939 P.2d at 1373-1374.

The governing criteria, or objectives of criminal punishment, apply whether the court is considering a fixed life sentence or a lesser sentence and include: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*, 130 Idaho at 294, 939 P.2d at 1373 (1997) (citations omitted). In *Jackson*, the Idaho Supreme Court reduced a defendant's fixed-life sentence for lewd conduct with a minor under sixteen, finding the fixed-life sentence was excessive in that case. *Jackson,* 130 Idaho at 296, 939 P.2d at 1375. In doing so the Court noted that

> a fixed life sentence is appropriate if necessary to protect society, to deter the individual and the public, if rehabilitation is unlikely, or if the behavior giving rise to the crime was so egregious that a determinate life sentence is necessary for proper punishment or retribution.

Id. at 295, 939 P.2d at 1374.

In the present case, Mr. Thurlow's actions were not so egregious that fixed-life sentence was necessary for punishment and retribution. The evidence presented strongly suggests that it was Mr. Lewers who killed Christopher West, not Mr. Thurlow. The evidence the State presented showed that the murder weapon belonged to Kurt Lewers, Christopher Lewers' father, and it was stolen from his house at a time when Christopher Lewers knew that his father was out of town. (Tr., p.639, L.6 – p.648, L.5; p.743, L.24 – p.818, L.17.; p.698, L.13 – p.729, L.10.) State's witness Tina Mongan testified that on the night of the murder, Christopher Lewers tried to sell her a .410 shotgun. (Tr., p.676, L.18 – p.677, L.24.)

When Mr. Lewers and Mr. Thurlow returned to Ms. Mongan's residence later that night, Mr. Lewers was wearing different clothing and had a cut over his eye while Mr. Thurlow was wearing the same clothing. (Tr., p.671, L.18 – p.672, L.11.) Although the .410 shotgun was found in Mr. Thurlow's house along with a shirt that contained Mr. West's blood, (Tr., p.398, L.12 – p.400, L.4; p.421, L.21 – p.422, L.18; p.1022, L.14 – p.1024, L.3), it was undisputed that Mr. Lewers had access to Kenny Thurlow's locked bedroom and that Michael Thurlow had found him "all the time" in the bedroom without Kenny Thurlow, including a couple of days before they were arrested. (Tr., p.1080, L.10 – p.1085, L.19.) Donny Dixon testified that it was Mr. Thurlow who informed him that Mr. West was dead and when he saw the body, it looked like the person with Mr. Thurlow was holding a gun near the body. (Tr., p.583, L.23 – p.585, L.24.)

Thus, the evidence shows that it was Mr. Lewers who killed Mr. West, not Mr. Thurlow. Unfortunately, the jury was not asked to find which one of the two killed Mr. West. (R., pp.314-315; *see also* Jury Instructions, *generally*.) The district court itself found that the jury "apparently" decided that Mr. Thurlow aided and abetted in Mr. West's murder. (Tr., p.1439, Ls.5-14.) Although Mr. Thurlow is "just as guilty" as Mr. Lewers, the fact that he most likely did not pull the trigger counsels against a finding that he is a cold-blooded killer deserving of a fixed life sentence. Thus, Mr. Thurlow's actions were not so egregious that a fixed life sentence was demanded by the district court's sense of retribution.

Even if the evidence showed that Mr. Thurlow did shoot Mr. West, the crime was not so egregious that retribution could only be meted out through a fixed-life sentence. Certainly any premeditated murder is a serious offense, but there was nothing in this

case that made this premeditated murder any more serious than any other non-capital murder case. In pronouncing the sentence, the district court stated:

> This case is like a lot of cases that I've had to deal with in the past that involve the death of a human being, and almost without exception it's usually a senseless loss. When I look at what occurred on this occasion, I don't know that any of us really know exactly and completely and entirely what or why, what happened happened, but the fact of the matter is it was an absolute shame, and it was a waste, and it's a tragedy for all of those involved.

(Tr., p.1436, Ls.17-24.) The court went on to state,

> I don't think I know, I'm not sure that the state knows, or anybody else seems to know exactly why Mr. West was killed. We never heard any evidence of any particular motive behind this particular killing, at least one that made any kind of sense, not that motives for killing necessarily have to make sense, but the court never heard such an explanation for this loss. I'm not even sure that Mr. Lewers and Mr. Thurlow know what the reason may be for this because of the cloud of methamphetamine that may have hung over the minds of those that were involved.

(Tr., p.1438, Ls.12-21.) The district court found that "given the deliberate and premeditated nature of this case, I think it does mandate and demand that the court impose the most significant sentence that the court is able to impose under the law." (Tr., p.1441, Ls.9-12.)

As noted above, a fixed life sentence should only be imposed in the most egregious of situations and where a defendant has no rehabilitative potential. Surely a deliberate and premeditated murder requires a significant punishment. The legislature has so articulated as such by mandating an indeterminate life sentence, with ten years fixed. I.C. § 18-4004. However, the district court's own description of the crime does not, in any way, show a premeditated murder any more egregious than any other premeditated murder. The jury apparently found that Mr. Thurlow and Mr. Lewers went to Evergreen Towing with the intent to kill Mr. West and one of them did so by shooting

him in the head with a shotgun. If the fact that a premeditated murder was enough, in and of itself, to warrant a fixed life sentence, the legislature has the power to mandate a fixed life sentence. It is not within the purview of the district court to mandate such a result where the legislature has not. The district court's finding that the deliberate and premeditated nature of the murder itself warranted the fixed life sentence is inconsistent with both the intent of the legislature and Idaho Supreme Court precedent mandating that a fixed life sentence cannot be imposed merely because the defendant committed a deliberate and premeditated murder.

Furthermore, any question about whether Mr. Thurlow can be rehabilitated is answered by the evidence presented at trial. The State's own witness, Donny Dixon, intimated that Mr. Thurlow prevented Mr. Lewers from killing him by walking over to him when Mr. Lewers was trying to get him in the line of fire. (Tr., p.587, Ls.9-21.) Mr. Thurlow himself testified that Mr. Lewers asked him to kill Mr. Dixon which Mr. Thurlow refused to do. (Tr., p.1189, Ls.11-16.) Even if Mr. Thurlow personally shot Mr. West, he demonstrated his rehabilitative potential by preventing the murder of Donny Dixon. Mr. Thurlow was presented with the choice of whether to kill or not kill Mr. Dixon and, not only did he chosse not to kill, he chose to put himself into harm's way in order to prevent Mr. Lewers from killing (most likely for the second time that night). The district court failed to consider this mitigating circumstance and a fixed-life sentence was not warranted.

Mr. Thurlow's fixed-life sentence is excessive considering other factors as well. First, Mr. Thurlow, though denying that he had any idea that Mr. Lewers would kill Mr. West, expressed his remorse to Mr. West's family. During the sentencing hearing,

Mr. Thurlow stated, "I would like to say how sorry I am that Christopher West is dead. If I could, I would change places with him. I am a single parent and I know what a burden it can be raising children by yourself. I pray for your family every night before I go to bed." (Tr., p.1433, Ls.20-24.) Idaho Courts recognize that a defendant's remorse is a mitigating factor that should be taken into consideration during sentencing. *See State v. Shideler*, 103 Idaho 593, 595, 651 P.2d 527, 529 (1982).

Furthermore, Tina Mongan testified that she, Mr. Thurlow and Mr. Lewers consumed methamphetamine on the night of Christopher West's death. (Tr., p.662, L.2 – p.670, L.1) The district court itself recognized that "a cloud of methamphetamine ... may have hung over the minds of those that were involved." (Tr., p.1438, Ls.19-21.) However, the district court failed to recognize that the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981). Assuming - as the jury apparently found - that Mr. Thurlow was guilty of considering whether to kill Mr. West and then deciding to kill him - whether by pulling the trigger or more likely by aiding and abetting Mr. Lewers - his use of methamphetamine surely must have clouded his judgment as Mr. Thurlow does not have a history of violent behavior.

The district court further abused its discretion because the court decided it was "not going to dwell to any certain degree on this prior criminal history in this case as opposed to what the nature of this particular crime was and how important." (Tr., p.1440, Ls.6-8.) This was Mr. Thurlow's only felony conviction and his prior misdemeanor convictions did not involve violence. (Presentence Investigation Report

(*hereinafter,* PSI), pp.2-5.) The Idaho Supreme Court has "recognized that the first offender should be accorded more lenient treatment than the habitual criminal." *State v. Hoskins*, 131 Idaho 670, 673, 962 P.2d 1054, 1057 (1998) (quoting *State v. Owen*, 73 Idaho 394, 402, 253 P.2d 203, 207 (1953), *overruled on other grounds by State v. Shepherd*, 94 Idaho 227, 486 P.2d 82 (1971)); *see also State v. Nice*, 103 Idaho 89, 91, 645 P.2d 323, 325 (1982). The defendant in *Hoskins* pled guilty to two counts of drawing a check without funds. *Hoskins*, 131 Idaho at 673, 962 P.2d at 1055. In *Nice*, the defendant pled guilty to the charge of lewd and lascivious conduct with a minor. *Nice*, 103 Idaho at 90, 645 P.2d at 324. In both *Hoskins* and *Nice*, the court considered, among other important factors, that the defendants had no prior felony convictions. *Hoskins*, 131 Idaho at 673, 962 P.2d at 1055; *Nice*, 103 Idaho at 90, 645 P.2d at 324. While Mr. Thurlow cannot be considered a "first offender" in the way a person with no prior criminal history would be considered, the fact that this was his first felony conviction and first conviction for any crime of violence weighs in favor of a sentence less than fixed life.

Mr. Thurlow does suffer from mental illness. Dr. Haugen conducted a psychological evaluation of Mr. Thurlow and noted that been previously diagnosed with bipolar disorder and was committed for a period of 45 days to a state hospital in 2000. (Dr. Haugen's Evaluation, p.1; *see also* PSI, p.8.) Dr. Haugen noted that Mr. Thurlow suffered from ongoing issues of anxiety and depression. (Dr. Haugen's Evaluation, p.5.) The State argued at sentencing that "the last words in Dr. Haugen's report are that Mr. Thurlow would pose a significant threat to the public at large." (Tr., p.1430, Ls.4-5.) Though not inaccurate, the State's assertion is misleading. Dr. Haugen's last words are

actually, "Based on his conviction, I would deem that his release at present would pose a significant threat to the public at large." (Dr. Haugen's Evaluation, p.5.) Dr. Haugen's conclusion was particlularized to the false assumption that Mr. Thurlow could be released immediately and did not comment on whether Mr. Thurlow could be released into the community in ten years, with the appropriate treatment.

While the State's argument may simply be deemed advocacy, the district court was required to consider Mr. Thurlow's mental illness. The Idaho Supreme Court has recognized that Idaho Code § 19-2523 requires the trial court to consider a defendant's mental illness as a sentencing factor. *Hollon v. State*, 132 Idaho 573, 581, 976 P.2d 927, 935 (1999) (citing *State v. Odiaga*, 125 Idaho 384, 391, 871 P.2d 801, 808 (1994)). Dr. Haugen noted that imprisonment would likely exacerbate his bipolar symptoms, he recommended that the prison treat Mr. Thurlow with the proper medications and help him adjust to prison life. (Dr. Haugen's Evaluation, p.5.) The district court considered Mr. Thurlow's mental illness, but found "unfortunately the state of Idaho and the department of corrections has very limited, if any, facilities available to adequately treat someone who is incarcerated who has those types of issues to deal with." (Tr., p.1440, Ls.16-19.) Thus, the district court reasoned, "your mental illness really is a factor not in the commission of the crime itself, but more a factor that would speak against the possibility of rehabilitation in such a case." (Tr., p.1441, Ls.3-6.)

The district court used Mr. Thurlow's mental illness in aggravation against him, not because his illness cannot be treated, but because in the court's view, the Department of Correction would refuse to treat it. This "aggravating" factor is in no way the fault of Mr. Thurlow; rather, it is the fault of the Department of Correction even

assuming the district court's unsupported finding is accurate. If a defendant cannot be rehabilitated solely because the Department of Correction refuses to rehabilitate him, the long established criteria that a district court must consider a defendant's potential for rehabilitation when fashioning an appropriate sentence would be illusory.

In summary, the district court imposed a fixed-life sentence because he was found to have committed a premeditated murder, without finding that Mr. Thurlow's crime was particularly egregious within the spectrum of premeditated murder as contemplated by the Idaho legislature and required by the Idaho Supreme Court. The district court ignored the fact that Mr. Thurlow demonstrated his rehabilitative potential by likely saving Mr. Dixon's life mere minutes after Mr. West's life was taken. The district court found that Mr. Thurlow was likely under the "cloud" of methamphetamine use, but failed to apply that finding to the nature of the crime and the character of Mr. Thurlow. The district court determined that it would not "dwell" on Mr. Thurlow's minimal criminal history when this minimal criminal history speaks volumes about how uncharacteristic this crime was for Mr. Thurlow. Finally, the district court found that Mr. Thurlow's mental illness was really an aggravating factor, not because it could not be treated, but because the Department of Correction would, in the court's view, not treat it. The district court abused its discretion when it imposed an excessive sentence.

CONCLUSION

Mr. Thurlow respectfully requests that this Court vacate his conviction and remand his case to the district court. Alternatively, Mr. Thurlow respectfully requests that this court vacate his fixed life sentence and either remand his case to the district court with instructions that Mr. Thurlow be sentenced to a lesser term or for this Court to impose a lesser sentence as it deems appropriate.

DATED this 6th day of February, 2009.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 6th day of February, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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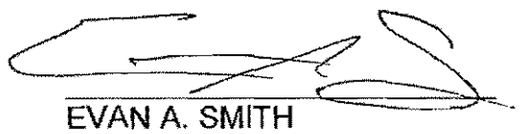

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